

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF ILLINOIS**

<b>IN RE:</b>	)	
	)	
<b>GILBERTO J. PENA,</b>	)	<b>No. 03-82887</b>
<b>d/b/a CHRISTINA'S RESTAURANT,</b>	)	
	)	
<b>Debtor.</b>	)	

**OPINION**

This matter is before the Court on confirmation of the Chapter 13 plan filed by the Debtor, Gilberto J. Pena, d/b/a/ Christina's Restaurant (DEBTOR), and the objection thereto asserted by the creditor, Seventh Street Corners, Inc. (SSCI). Following an evidentiary hearing on August 28, 2003, the Court took the matter under advisement.

**FACTS**

The DEBTOR operates a restaurant known as Christina's located at 655 17th Avenue, East Moline, Illinois. The real estate is owned by SSCI. The DEBTOR began his occupancy of the property in 1994, when he assumed an existing lease for the premises. That written lease included an option for a sixty-month extension, which the DEBTOR exercised. The extended term expired as of September 1, 2002. SSCI allowed the DEBTOR to remain in possession after September 1, 2002, under the same terms and conditions as set forth in the written lease, including payment of rent at the rate of \$650.00 per month. This post-September 1, 2002, arrangement was never reduced to writing.

During the nine years that the DEBTOR has occupied the property, a substantial rent arrearage has accrued, totaling \$14,946.69 as of the petition date. The DEBTOR has made no rent payment since December 16, 2002, when he made a partial payment in the amount

of \$500.00. Prior to the bankruptcy, SSCI commenced a forcible entry and detainer action which was stayed by the bankruptcy filing on June 12, 2003, prior to entry of a judgment for possession.

The DEBTOR was ordered to make post-petition adequate protection payments to SSCI in the amount of \$650.00 per month but no payments have been made. The DEBTOR asserts that he has the money for the post-petition payments but wants a receipt at the time the payments are made. SSCI is the sole creditor scheduled by the DEBTOR. The DEBTOR'S Chapter 13 plan proposes to assume the lease with SSCI. The post-petition rent payments are to be paid current, as they come due, and the pre-petition arrearage is to be paid over forty-five months.

SSCI objects to confirmation of the plan alleging that the lease expired pre-petition so that the DEBTOR has no leasehold interest that may be assumed. The DEBTOR takes the position that because the bankruptcy case was filed before the judgment was entered in the forcible entry case, the lease was not terminated and the DEBTOR holds a continuing interest that can be preserved in his Chapter 13 case.

Following an evidentiary hearing, the Court took the matter under advisement. The Court gave the parties an opportunity to submit post-trial briefs, but none were filed. Neither party saw fit to introduce the lease into evidence and there is nothing in the record to indicate what, if anything, the lease had to say about the parties' rights after expiration of its term. The Court will assume the lease was silent in this regard and will look to the common law to fill in that blank.

## ANALYSIS

Generally, any executory contract or unexpired lease may be assumed or rejected by the debtor. 11 U.S.C. § 365(a). However, a lease of nonresidential real property that has been terminated under applicable nonbankruptcy law prior to the bankruptcy filing may not be assumed. 11 U.S.C. § 365(c)(3). In fact, a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease prior to the bankruptcy filing is not property of the estate. 11 U.S.C. § 541(b)(2). A lease of nonresidential real property that terminates at expiration of its stated term during the bankruptcy case, ceases to be property of the estate upon such termination. 11 U.S.C. § 541 (b)(2); *Erickson v. Polk*, 921 F.2d 200 (8th Cir. 1990).

The DEBTOR admits that the written lease expired when its stated term, as extended by the option period, ended on September 1, 2002. SSCI argues that the inquiry stops there in that the lease expired pre-petition and that an expired lease may not be assumed because the DEBTOR no longer has an interest in the property. The DEBTOR argues that he is a holdover tenant with a new interest in the property that survives expiration of the written lease and that it is this new interest, not the old lease, that may be assumed.

As a general principle, the bankruptcy estate's interest in property acquired from the debtor at the outset of the case can be no greater or no less than the extent of the debtor's interest in the property as it existed on the petition date under non-bankruptcy law. *In re Macomb Occupational Health Care, LLC*, 300 B.R. 270 (Bankr.E.D.Mich. 2003). Unless a particular federal interest requires a different result, property interests are created and

defined by state law. *Butner v. U.S.*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136, 141-42 (1979). Whether the DEBTOR is, in fact, a holdover tenant with continuing rights in the property is a question of Illinois law.

The failure of a tenant to vacate the premises following the expiration of a lease term creates either a tenancy at sufferance or a holdover tenancy. *Troccoli v. L&B Products of Illinois, Inc.*, 189 Ill.App.3d 319, 545 N.E.2d 219, 136 Ill.Dec. 695 (Ill.App. 1 Dist. 1989). The essence of a tenancy at sufferance is that the tenant has maintained possession wrongfully, without the landlord's permission. *Bransky v. Schmidt Motor Sales, Inc.*, 222 Ill.App.3d 1056, 584 N.E.2d 892, 165 Ill.Dec. 458 (Ill.App. 2 Dist. 1991). Where the tenant remains in possession of the premises with the consent of the landlord and continues to pay rent, the nature of the occupancy will be deemed to be a holdover tenancy. *Wanous v. Balaco*, 412 Ill. 545, 107 N.E.2d 791 (1952); *In re Sauk Steel Co., Inc.*, 133 B.R. 431, 437 (Bankr.N.D.Ill. 1991). It is the landlord's intent, not the tenant's, that is determinative of whether a tenant under an expired lease is to be treated as a holdover tenant or a tenant at sufferance. *Bismarck Hotel Co. v. Sutherland*, 92 Ill.App.3d 167, 415 N.E.2d 517, 47 Ill.Dec. 512 (Ill.App. 1 Dist. 1980). Where the landlord acts affirmatively and unequivocally to terminate the tenant's occupancy upon expiration of the lease term, the claim of holdover tenancy will be rejected and the tenant will be treated as one at sufferance. *Id.*

Although the extended lease term expired on September 1, 2002, the DEBTOR continued to occupy the premises with the consent of SSCI under the same terms and conditions that previously applied. SSCI did not seek to evict the DEBTOR as of September 1, 2002, and did not give notice of any such intent. Rather, it continued to accept the

DEBTOR'S rent payments made on September 18, 2002, October 30, 2002, December 5, 2002 and December 16, 2002. Based on this undisputed evidence, the Court finds that the DEBTOR became a holdover tenant as of September 1, 2002.

These circumstances raise several questions. Is a holdover tenancy a new leasehold interest, independent of the expired written lease, that is itself assumable under Section 365(a)? Or is it the old written lease, expired but not yet terminated, that is subject to assumption by the DEBTOR? Or is SSCI correct, that expiration of the term of the written lease leaves the DEBTOR with nothing to assume, notwithstanding the existence of a holdover tenancy?

There is support in the case law for the proposition that a lease whose term has expired or that has terminated, contractually, because of the tenant's default, is nonetheless assumable so long as the bankruptcy case is filed before the tenant's right of occupancy has been terminated by entry of a judgment for possession in a forcible entry and detainer act suit. *In re Consol. Medical Transport, Inc.*, 300 B.R. 435 (Bankr.N.D.Ill. 2003). The Seventh Circuit has held that there is no substantive distinction to be drawn between a lease's "expiration" and "termination" for the purpose of the assumption analysis; rather, the bankruptcy provision allowing unexpired leases to be assumed requires a determination merely of whether the lease has ended under state law. *Robinson v. Chicago Housing Authority*, 54 F.3d 316 (7th Cir. 1995). These cases recognize that, absent voluntary abandonment by the tenant, the sole remedy available to an Illinois landlord to regain possession from a residential tenant, whether because of the tenant's breach during the term of the lease or expiration and nonrenewal of the lease, is compliance with the Forcible Entry

and Detainer Act, 735 ILCS 5/9-101 *et. seq.* *Matter of Williams*, 144 F.3d 544, 547 (7th Cir. 1998) (permitting stay modification to allow a pre-petition forcible entry action to proceed but expressly declining to address whether lease was “unexpired” and therefore assumable under § 365). Thus, an existing right of possession is an assumable interest, even if the lease itself has contractually expired or terminated, unless and until possession has been awarded to the landlord by entry of a judgment in a forcible entry and detainer suit.

This rule is easily applied where the term of the lease has not yet expired. There, assumption of the lease gives the debtor or the estate the right of occupancy and enjoyment of the premises through the remaining term of the assumed lease. But where, as here, the term of the lease expired pre-petition, what is the nature and extent of the interest that is being assumed? The simple answer is that assumption results in retention by the debtor or the estate of whatever rights in the premises the debtor had as of the petition date. Those rights are defined by state law.

Under Illinois law, the term of a holdover tenancy is dependent upon the term of the expired lease. Where the term of the lease was for a period less than a year, the holdover tenancy will be construed as being for another term of the same length of time. Where the lease term was for one year or more, the holdover tenancy is for one year, and from year to year. *Wanous v. Balaco, supra*; *Bransky, supra*. Since the DEBTOR’S lease with SSCI was for a term of years, the DEBTOR’S holdover tenancy is for one year, running from September 1, 2002 through August 31, 2003, renewable year to year.

A year to year tenancy is terminable by notice and renews automatically by failure to give notice to terminate. *Daugherty v. Burns*, 331 Ill.App.3d 562, 772 N.E.2d 237, 265

Ill.Dec. 199 (Ill.App. 4 Dist. 2002), *appeal denied*, 202 Ill.2d 600, 787 N.E.2d 156, 272 Ill.Dec. 341 (2002). As a necessary part of its forcible entry and detainer action, SSCI gave the DEBTOR notice to quit the premises. The notice was given pre-petition, during the first year of the DEBTOR'S holdover tenancy. Accordingly, the notice effected a termination of the holdover tenancy no later than the conclusion of the annual term, August 31, 2003. Since a judgment for possession had not been entered pre-petition, the DEBTOR'S remaining leasehold interest through that date became property of the estate when the petition was filed on June 12, 2003. When the holdover tenancy lapsed as of September 1, 2003, the DEBTOR lost his right to remain in possession of the real estate and the property of the estate no longer included any interest of the DEBTOR in the real estate pursuant to Section 541(b)(2). At that point, the automatic stay no longer applied to any act by SSCI to obtain possession of the property. 11 U.S.C. § 362(b)(10).

The Court concludes that the DEBTOR has the right to assume the holdover tenancy interest that he enjoyed on the petition date, but that that interest has now expired as of September 1, 2003. The bankruptcy filing does not operate to expand the DEBTOR'S rights beyond those he possessed under nonbankruptcy law as of the petition date. The bankruptcy filing cannot and does not force SSCI to continue to lease the premises to the DEBTOR beyond the now elapsed one-year term of the holdover tenancy. The benefit to the DEBTOR to be gained by assumption under Section 365(a) is limited to the right to remain in the property only through August 31, 2003.

The amended plan proposes that the DEBTOR retain possession of the premises through its forty-five-month term. Because the amended plan attempts to give the DEBTOR

greater rights in the premises than he possessed on the petition date, confirmation must be denied. The DEBTOR will be given fourteen (14) days to file a second amended plan, or to move to dismiss or convert this case.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

Dated: December 3, 2003.

---

THOMAS L. PERKINS  
UNITED STATES BANKRUPTCY JUDGE

Copies to:

Michael J. Galvin, Attorney for Debtor, 1800 3rd Avenue, Rock Island, Illinois 61201

Greg G. Chickris, Attorney for Seventh Street Corners, 4500 Kennedy Drive, P.O. Box 457,  
Moline, Illinois, 61244

Richard A. Bowers, Trustee, P.O. Box 3760, Rock Island, Illinois 61204

U.S. Trustee, 401 Main Street, Suite 1100, Peoria, Illinois 61602



UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF ILLINOIS

IN RE: )  
 )  
GILBERTO J. PENA, ) No. 03-82887  
d/b/a CHRISTINA'S RESTAURANT, )  
 )  
Debtor. )

**ORDER**

For the reasons stated in an Opinion filed this day, IT IS HEREBY ORDERED that confirmation of the amended Chapter 13 Plan filed by the DEBTOR, GILBERTO J. PENA, should be and hereby is DENIED. Within fourteen (14) days, the DEBTOR shall file a second amended plan or a motion to dismiss or convert this case.

Dated: December 3, 2003.

---

THOMAS L. PERKINS  
UNITED STATES BANKRUPTCY JUDGE

Copies to:  
Michael J. Galvin  
Greg G. Chickris  
Richard A. Bowers  
U.S. Trustee